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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Implement the
Commission's Procurement Incentive Framework and
to Examine the Integration of Greenhouse Gas
Emissions Standards into Procurement Policies.

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Rulemaking 06-04-009
(Filed April 13, 2006)

**ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of:

Order Instituting Informational Proceeding on a
Greenhouse Gas Emissions Cap

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Docket 07-OIIP-01

**COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON THE INTERIM DECISION ON REPORTING AND TRACKING**

August 24, 2007

Bruce McLaughlin
C. Anthony Braun
Braun & Blaising, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814
Tel: (916) 326-5812
Fax: (916) 326-5813
Email: mclaughlin@braunlegal.com

*Attorneys for the California Municipal Utilities
Association*

**COMMENTS OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
ON THE INTERIM DECISION ON REPORTING AND TRACKING**

In accordance with Rules of Practice and Procedure of the Public Utilities Commission (“CPUC”) of the State of California, the California Municipal Utilities Association (“CMUA”) hereby files these Opening Comments (“Comments”) on the *Interim Opinion on Reporting and Tracking of Greenhouse Gas Emissions in the Electricity Sector* (“Interim Opinion”) issued August 15, 2007, in Rulemaking 06-04-009. CMUA also files these Comments with the California Energy Commission (“CEC”) in Docket 07-OIIP-01. In these Comments, the CPUC and CEC will collectively be called the “Joint Agencies.”

I. STATEMENT OF POSITION

CMUA members reaffirm their commitment to achieving the “statewide greenhouse gas emissions limit” as it will be set by the California Air Resources Board (“CARB”).¹ The Joint Agencies should interpret CMUA’s Comments in a productive light. CMUA offers comments related to the following points.

- The definition for “real reductions” exceeds the scope of AB 32. CARB’s statutory authority is limited to regulating “statewide greenhouse gas emissions” as that term is defined in AB 32 and does not include emissions from electricity generated out-of-state that is not delivered to and consumed within California.²
- In order to be approved by the Office of Administrative Law, CARB’s regulations must meet certain standards including necessity,³ authority,⁴ and consistency.⁵ Therefore, in order to be considered by CARB, recommendations from the Joint Agencies must not violate these principles.

¹ Health & Safety Code § 38505(n).

² Health & Safety Code § 38505(m).

³ Gov’t Code §§ 11349(a), 11349.1(a); 1 Cal. Code Regs. §§ 10, 11.

⁴ Gov’t Code § 11349(b); 1 Cal. Code Regs. § 14.

⁵ Gov’t Code § 11349(d).

- The Protocols must only attribute emissions to reporting entities according to the amount of electricity actually delivered to and consumed in California and not according to their proportional ownership share.
- Reporting entities should be attributed with the actual emissions of purchases, sales, and exchanges for all specified new and existing sources.

II. RULES OF THE ADMINISTRATIVE PROCEDURE ACT

CMUA makes note that the Administrative Procedure Act (“APA”) sets standards for regulations adopted by CARB.⁶ In order to be approved by the Office of Administrative Law, CARB regulations must meet certain standards including necessity, authority, and consistency. As proposed by the Interim Decision, certain aspects of the Proposed Electricity Sector Greenhouse Gas Reporting and Tracking Protocol⁷ (“Protocol”) may not meet these standards.

Pursuant to the APA, "necessity" means that “the record of the rulemaking proceeding demonstrates by substantial evidence the *need for a regulation to effectuate the purpose of the statute . . .*”⁸ The court’s inquiry is generally confined to the question of whether or not the regulation is "arbitrary, capricious or [without] reasonable or rational basis,”⁹ however, “[a]dministrative regulations that alter or amend the statute or enlarge or impair its scope are void”¹⁰

The APA requirement for "authority" shall be presumed to exist only if CARB cites a California constitutional or statutory provision which: (1) expressly permits or obligates the agency to adopt the regulation; or (2) grants a power to the agency which impliedly permits or obligates the agency to adopt the regulation in order to achieve the purpose for which the

⁶ Gov’t Code § 11340, *et seq.*

⁷ Interim Opinion, Attachment A.

⁸ Gov’t Code § 11349(a) (emphasis added). A court may invalidate a regulation if it finds “[t]he agency’s determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.” Gov’t Code § 11350(b)(1).

⁹ *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 (1998).

¹⁰ *Henning v. Division of Occupational Saf. & Health*, 219 Cal. App. 3d 747, 758 (1990).

power was granted.¹¹

The APA requirement for “consistency” means that the regulation is “in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”¹² Under the proper legal standard of review, a court will determine whether the agency reasonably interpreted its legislative mandate when deciding that the challenged regulation was necessary to accomplish the purpose of the statute. In other words, “the court will determine whether the regulation is reasonably designed to aid a statutory objective.”¹³

III. SEVERAL PROTOCOL SECTIONS VIOLATE THE PRINCIPLES OF AB 32

A. Definition of real reductions

Importantly, the term "statewide greenhouse gas emissions" (“Statewide GHG Emissions”) means the “total annual emissions of greenhouse gases *in the state*, including all emissions of greenhouse gases from the generation of electricity *delivered to and consumed in California*, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported.”¹⁴ The "statewide greenhouse gas emissions limit" (“Statewide GHG Limit”) is the maximum allowable level of Statewide GHG Emissions in 2020¹⁵ which will be set equivalent to the historical Statewide GHG Emissions level in 1990.¹⁶ In order to monitor and enforce compliance with AB 32 requirements, CARB shall adopt regulations to require the reporting of GHG emissions¹⁷ from sources that affect the Statewide GHG Limit.¹⁸ This includes the GHG emissions “from all *electricity consumed in the state*, including transmission and distribution line losses from electricity generated within

¹¹ Gov’t Code § 11349(b); 1 Cal. Code Regs. § 14.

¹² Gov’t Code § 11349(d).

¹³ *Benton v. Board of Supervisors*, 226 Cal.App.3d 1467, 1479 (1991).

¹⁴ Health & Safety Code § 38505(m) (emphasis added).

¹⁵ Health & Safety Code § 38505(n).

¹⁶ Health & Safety Code § 38550.

¹⁷ Health & Safety Code § 38530(b)(1).

¹⁸ Health & Safety Code § 38505(i).

the state or imported from outside the state.”¹⁹ AB 32 could not, and did not, authorize CARB to monitor or limit any GHG emissions from electricity except for those actually *emitted in the state* or resulting from electricity *consumed in the state*.

CMUA believes that the Interim Opinion errs in its interpretation of real reductions by expanding the geographic scope of AB 32 to include emissions that have *no* connection with the State of California.²⁰ Pursuant to the Statewide GHG Limit and emission reduction measures that will be established by CARB,²¹ POU’s recognize the need to begin reducing their Statewide GHG Emissions. These emission reductions achieved by the POU’s, i.e., *the reductions in their Statewide GHG Emissions*, must be “real, permanent, quantifiable, verifiable, and enforceable” by CARB.²² A “real” reduction of Statewide GHG Emissions will actually occur if the POU reduces its “total annual emissions of greenhouse gases *in the state*, including all emissions of greenhouse gases from the generation of electricity *delivered to and consumed in California*, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported.”²³ The definition of “real” is necessarily limited to the jurisdictional scope of AB 32.

B. Protocol sections 3.7/3.9/3.11 – total emissions attributed to reporting entities

The Joint Agencies intend these Protocols to be used by CARB for determining a reporting entity’s compliance with the Statewide GHG Limit.²⁴ Accordingly, it appears that a reporting entity’s compliance will be gauged by its total CO₂e emissions from owned facilities and purchases²⁵ minus adjustments for certain sales from specified²⁶ and unspecified

¹⁹ Health & Safety Code § 38530(b)(2) (emphasis added).

²⁰ Interim Opinion at 15.

²¹ Health & Safety Code §§ 38550, 38560, 38562.

²² Health & Safety Code § 38562(d)(1). This requirement pertains to the regulations adopted by CARB which deal only with Statewide GHG Emissions. Health & Safety Code § 38562(d). See also Health & Safety Code § 38565 (recognizing a jurisdictional limit on CARB’s authority over GHG emission rules.)

²³ Health & Safety Code § 38530(b)(2) (emphasis added). The concept of “leakage” as defined in AB 32 is not implicated by reducing the amount of out-of-state electricity delivered to and consumed in California, so, leakage will not be discussed here. Health & Safety Code § 38505(j).

²⁴ Interim Opinion at 11.

²⁵ Protocol section 3.7.

resources²⁷ to counterparties within California. CMUA is unclear concerning the Protocol's proposed treatment of sales and exchanges to counterparties outside California. Furthermore, the Protocol adds reporting restrictions on plant operations, purchases, and sales that are contrary to the statutory reach of AB 32.

C. Protocol section 3.2 – emissions for owned plants

Protocol section 3.2 states that emissions from an owned powerplant should be attributed “to the reporting entity based on its proportional ownership share (not the amount of electricity received).” CMUA recognizes that reporting entities must provide sufficient information so that CARB may monitor and verify compliance. Therefore, Protocol 3.2 understandably would comprise an initial “gross” value of emissions from a particular power plant. In particular to plants located outside California, the reasonableness of section 3.2 is entirely dependent upon making the proper adjustments for electricity that was *not delivered and consumed* in California by the reporting entity/power plant owner.

D. Protocol sections 3.3/3.4/3.6 – emissions for purchases and exchanges from specified sources

Protocols 3.3/3.4/3.6 *effectively* place limitations on the types of specified resources that reporting entities may purchase or exchange by attributing emission levels to “certain power” that is “different than the level of GHG emissions that [actually] *occurs* from the source specified in the contract.”²⁸ For power plants that became operational before January 1, 2008 and that have actual emission factors lower than the applicable default emission factor,²⁹ Protocols 3.3/3.4/3.6 *effectively* limit purchases and exchanges with these power plants by attributing the applicable default emission factor to them. Under Protocols 3.3/3.4/3.6, a zero-emission eligible renewable resource could be attributed an emission level as high as 1075 pounds CO₂e per MWh.³⁰

²⁶ Protocol section 3.9.

²⁷ Protocol section 3.11.

²⁸ Interim Opinion at 16 (emphasis added).

²⁹ See Protocol section 3.6.

³⁰ Protocol sections 3.4, 3.6; Interim Opinion at 26-31.

E. Protocol sections 3.8/3.9 – emission adjustments for sales and exchanges from specified sources

The Interim Opinion states that the Protocols, “taken as a whole, would not automatically result in a retail provider being responsible for all of the GHG emissions associated with its ownership share of the plant.”³¹ Yet, Protocols 3.8/3.9 *effectively* place limitations on sales and exchanges *from* specified resources by setting unreasonable, arbitrary, and capricious restrictions on calculating the emissions attributed to the reporting entity³² for sales or exchanges greater than 10 percent of the reporting entity’s ownership share. Protocols 3.8/3.9 attribute to the reporting entity, emissions for the sold or exchanged “power using the average emission factor of power available for sales from unspecified sources”³³ unless the reporting entity can prove that: (1) the power could not be delivered to itself; or (2) the reporting entity did not need the power because it had surplus power from its owned power plants and the specified plant was the marginal plant.³⁴

CMUA believes that these Protocols have several problems. One problem is that the Protocols summarily impute malfeasance to reporting entities for engaging in a proper sale or exchange. In addition, Protocols 3.8/3.9 do not appear to expressly mention the situation when electricity generated by a specified source outside California is then sold or exchanged by the power plant owner whereby the electricity is delivered and eventually consumed outside California. CMUA seeks clarification that emissions from the electricity included in these sales and exchanges are not attributable to that power plant owner.

IV. CONSTITUTIONAL ISSUES IMPLICATED BY THE PROTOCOLS

If the Protocols discussed above were adopted by CARB as proposed, CMUA believes that several constitutional issues may arise. They are briefly mentioned below.

A. Substantive due process

The Due Process Clause of the Fifth and Fourteenth Amendments require that laws

³¹ Interim Opinion at 20.

³² Interim Opinion at 19-20.

³³ Protocol 3.9.

³⁴ Protocol 3.8.

passed by the federal and state government must not be “unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”³⁵ In particular, the criteria for Protocol sections 3.3 and 3.8 discussed above are not reasonably necessary to effectuate the purpose of the statute and may violate substantive due process by depriving plant-owning retail sellers of property without due process of law.

B. Regulatory taking

The Takings Clause of the Fifth Amendment of the U.S. Constitution provides that no “private property be taken for public use, without just compensation.”³⁶ Although, public property may be taken through eminent domain by a superior sovereign without compensation,³⁷ there are two primary exceptions to the general rule: federal takings of state property and takings of public property held in a proprietary capacity.

In regard to POU, California courts have upheld an exception to the general rule where the public property is being held in a proprietary capacity and the analysis for determining a Fifth Amendment violation is identical to the analysis involving private property.³⁸ The landmark case was an 1861 California Supreme Court case which held that when municipal corporations hold private property for municipal uses, that property acquires the protections of private property.³⁹ The State cannot take away the “private property of the [municipal] corporation or change the uses of its private funds acquired under the public faith.”⁴⁰ Owning infrastructure for generating electricity is undoubtedly a proprietary act of a local government.⁴¹ Modern cases continue to support this position. In 1963, the Second Appellate

³⁵ *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

³⁶ U.S. CONST. amend. V.

³⁷ EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 32.81 (3d ed. 2007).

³⁸ *Id.*

³⁹ *Grogan v. San Francisco*, 18 Cal. 590, 613 (1861). “So far as municipal corporations are invested with subordinate legislative powers for local purposes, they are mere instrumentalities of the State for the convenient administration of the Government, and their powers are under the entire control of the Legislature; they may be qualified, enlarged, restricted, or withdrawn at its discretion. But these bodies . . . ”may also be empowered to take and hold private property for municipal uses, and such property is invested with the security of other private rights.” *Id.*

⁴⁰ *Id.* (quoting 4 Wheat 694).

⁴¹ The Federal Court for the Southern District of California held that when a city contracts “for water works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but

District of the California Court of Appeal held that “lands held by a municipal corporation in its proprietary capacity may not be taken from it by the State without the payment of just compensation.”⁴²

There are four different tests in which a taking may be analyzed.⁴³ At least two tests are relevant to the proposed Protocols.

1. Lucas Per Se Taking

In *Lucas v. S.C. Coastal Council*,⁴⁴ the U.S. Supreme Court stated that a *per se* taking exists if the regulation “completely deprive[s] an owner of ‘all economically beneficial use’ of her property.”⁴⁵ A *per se* taking by the proposed Protocols is plausible in light of the Statewide GHG Limit that will be mandated on all reporting entities. It will be necessary for virtually all California reporting entities to reduce the Statewide GHG Emissions in their portfolio. Undoubtedly, those reporting entities with ownership interests in high emission power plants will need to replace the high emission resources currently used to *actually* serve their load and procure lower emission resources to *actually* serve their load. The Protocol, however, will penalize this action unless the low emission resource was already under contract with the reporting entity prior to January 1, 2008, or the low emission resource was not operational before January 1, 2008.

By attributing the default emission factors to an existing resource that actually emits low or zero-emissions, the Protocol has effectively restricted the ability of a power plant owner to sell or exchange power to achieve actual reductions in its Statewide GHG Emissions. Therefore, the Protocol leaves the power plant owner with only two options to reduce its Statewide GHG Emissions: (1) selling the owner’s share in the plant; or (2) laying-off the owner’s proportional share by actually changing the power plant’s operation.⁴⁶ In both

its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens.” *Los Angeles City Water Co. v. Los Angeles*, 88 F. 720, 732 (1898) (citing 1 DILLION MUN. CORP. § 27).

⁴² *People v. Los Angeles*, 220 Cal. App. 2d 345, 351 (1963).

⁴³ *Lingle v. Chevron*, 544 U.S. 528, 548 (2005).

⁴⁴ 505 U.S. 1003 (1992).

⁴⁵ 505 U.S. at 1019.

⁴⁶ Interim Opinion at 20.

of these cases, the Interim Opinion states that the reporting entity would no longer be responsible for emissions from the powerplant but also in both cases, the power plant owner will be deprived of all beneficial use of the property. The complete and absolute economic deprivation is abundantly clear if the owner cannot sell the plant and must lay-off its proportional share.

In regard to a [forced-]sale of the ownership share, CMUA points out that if the plant remains in operation under the new ownership, then the original emissions will continue unabated. Therefore, even if an owner sells its interest in a power plant, no real reduction will be achieved *according to the Interim Opinion's definition*.⁴⁷ This provides an additional example of Protocol's arbitrary standard that has no substantial relation to achieving emission reductions.

2. *Penn Central Factors*

When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the factors the Court discussed in *Pennsylvania Central Transportation Co. v. New York City*.⁴⁸ In determining whether or not a regulatory action constituted a taking that required just compensation, the *Penn Central* Court devised criteria to analyze: (1) the economic impact of the regulation on the reporting entity; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

At this point, CMUA will not engage in a complete *Penn Central* analysis of the Protocols using a specific POU example. It is enough to state that the economic impact of selling or laying off the proportional share of a large coal-fired plant could cost the plant owner many millions of dollars. A forced sale or lay-off of the plant would surely interfere with the owner's reasonable investment-backed expectations whereby the owner could not have contemplated that contingency years ago during the original investment. The last test of the takings analysis considers the nature rather than the merit of the governmental action, and particularly whether the regulation is closer to a governmental adjustment of economic

⁴⁷ Interim Opinion at 15.

⁴⁸ 438 U.S. 104, 124 (1978).

benefits and burdens.⁴⁹ In terms of achieving reductions in Statewide GHG Emissions that will benefit all Californians, a Protocol section that effectively forces an owner to sell or lay-off its generating capacity implicates a public obligation and a compensatory payment to the affected plant owner.

C. Impairment of Contracts

The Contract Clause of the U.S. Constitution provides that "[n]o State shall... pass any... law impairing the obligation of contracts"⁵⁰ In *United States Trust Co. v. New Jersey*,⁵¹ the Court stated that, "[i]t long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. Yet, the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects."⁵² However, the "adjusting [of] the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."⁵³

In *U.S. Trust Co.* the Court outlined a process to determine whether an impairment of contract had taken place. Essentially, the severity of the impairment acts as a measure for the state action. A minimal alteration of contractual obligations may end the inquiry at its first stage. A "[s]evere impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."⁵⁴ Then the court must decide if the impairment served a significant and legitimate public purpose.⁵⁵ Lastly, the impairment must not be overly broad and unnecessary because "[a] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally

⁴⁹ 438 U.S. at p. 127; The California Supreme Court laid out ten factors for analyzing a takings issue. *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 775-776 (1997). *Kavanau* utilized ten factors from *Penn Central* and subsequent cases to determine if a taking has occurred.

⁵⁰ U.S. CONST., Art. I, § 10, cl. 1.

⁵¹ 431 U.S. 1 (1977).

⁵² 431 U.S. at 14.

⁵³ *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 244 (citing *U.S. Trust Co.*).

⁵⁴ 438 U.S. at 245.

⁵⁵ 431 U.S. at 22.

well.”⁵⁶ As mentioned above, the Protocol may trigger an unconstitutional impairment of contracts if it effectively forces a plant owner into an untenable choice between sale and lay-off or failing to comply with the Statewide GHG Limit.

V. CONCLUSION

CMUA requests that the Joint Agencies take these Comments under advisement in proposing changes to the Protocols that are consistent with AB 32, constitutional principles, and the APA.

Dated: August 24, 2007 Respectfully submitted,



Bruce McLaughlin
Braun & Blaising, P.C.
915 L Street, Suite 1270
Sacramento, CA 95814
(916) 326-5812
(916) 326-5813 (facsimile)
mclaughlin@braunlegal.com

Attorneys for the California Municipal Utilities Assn.

⁵⁶ 431 U.S. at 31.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the attached:

COMMENTS OF THE CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION ON THE INTERIM DECISION ON REPORTING AND TRACKING

on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named in the official service list. I served a copy of the document on those without e-mail addresses by mailing the document by first-class mail addressed as follows:

See attached service list

Executed this 24th day of August 2007, at Sacramento, California.

A handwritten signature in black ink, appearing to be 'RB' with a large, stylized flourish extending from the right side.

Ryan Bernardo

Service List R.06-04-009

Appearance

CINDY ADAMS
COVANTA ENERGY CORPORATION
40 LANE ROAD
FAIRFIELD, NJ 07004

STEVEN S. SCHLEIMER
DIRECTOR, COMPLIANCE & REGULATORY AFFAIRS
BARCLAYS BANK, PLC
200 PARK AVENUE, FIFTH FLOOR
NEW YORK, NY 10166

STEVEN HUHAN
MORGAN STANLEY CAPITAL GROUP INC.
2000 WESTCHESTER AVENUE
PURCHASE, NY 10577

RICK C. NOGER
PRAXAIR PLAINFIELD, INC.
2711 CENTERVILLE ROAD, SUITE 400
WILMINGTON, DE 19808

KEITH R. MCCREA
ATTORNEY AT LAW
SUTHERLAND, ASBILL & BRENNAN, LLP
1275 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004-2415

ADAM J. KATZ
MCDERMOTT WILL & EMERY LLP
600 13TH STREET, NW.
WASHINGTON, DC 20005

CATHERINE M. KRUPKA
MCDERMOTT WILL AND EMERY LLP
600 THIRTEEN STREET, NW
WASHINGTON, DC 20005

LISA M. DECKER
CONSTELLATION ENERGY GROUP, INC.
111 MARKET PLACE, SUITE 500
BALTIMORE, MD 21202

CATHY S. WOOLLUMS
MIDAMERICAN ENERGY HOLDINGS COMPANY
106 EAST SECOND STREET
DAVENPORT, IA 52801

KEVIN BOUDREAUX
CALPINE POWER AMERICA-CA, LLC
717 TEXAS AVENUE, SUITE 1000
HOUSTON, TX 77002

THOMAS DILL
PRESIDENT
LODI GAS STORAGE, L.L.C.
1021 MAIN ST STE 1500
HOUSTON, TX 77002-6509

E.J. WRIGHT
OCCIDENTAL POWER SERVICES, INC.
5 GREENWAY PLAZA, SUITE 110
HOUSTON, TX 77046

PAUL M. SEBY
MCKENNA LONG & ALDRIDGE LLP
1875 LAWRENCE STREET, SUITE 200
DENVER, CO 80202

TIMOTHY R. ODIL
MCKENNA LONG & ALDRIDGE LLP
1875 LAWRENCE STREET, SUITE 200
DENVER, CO 80202

STEPHEN G. KOERNER, ESQ.
EL PASO CORPORATION
WESTERN PIPELINES
2 NORTH NEVADA AVENUE
COLORADO SPRINGS, CO 80903

JENINE SCHENK
APS ENERGY SERVICES
400 E. VAN BUREN STREET, SUITE 750
PHOENIX, AZ 85004

JOHN B. WELDON, JR.
SALMON, LEWIS & WELDON, P.L.C.

KELLY BARR
MANAGER, REGULATORY AFFAIRS & CONTRACTS

2850 EAST CAMELBACK ROAD, SUITE 200
PHOENIX, AZ 85016

SALT RIVER PROJECT
PO BOX 52025, PAB 221
PHOENIX, AZ 85072-2025

ROBERT R. TAYLOR
AGRICULTURAL IMPROVEMENT AND POWER DIST.
1600 NORTH PRIEST DRIVE, PAB221
TEMPE, AZ 85281

STEVEN S. MICHEL
WESTERN RESOURCE ADVOCATES
2025 SENDA DE ANDRES
SANTA FE, NM 87501

ROGER C. MONTGOMERY
VICE PRESIDENT, PRICING
SOUTHWEST GAS CORPORATION
PO BOX 98510
LAS VEGAS, NV 89193-8510

RONALD F. DEATON
LOS ANGELES DEPARTMENT OF WATER & POWER
111 NORTH HOPE STREET, ROOM 1550
LOS ANGELES, CA 90012

SID NEWSOME
TARIFF MANAGER
SOUTHERN CALIFORNIA GAS COMPANY
GT 14 D6
555 WEST 5TH STREET
LOS ANGELES, CA 90051

DAVID L. HUARD
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BOULEVARD
LOS ANGELES, CA 90064

CURTIS L. KEBLER
J. ARON & COMPANY
SUITE 2600
2121 AVENUE OF THE STARS
LOS ANGELES, CA 90067

DENNIS M.P. EHLING
ATTORNEY AT LAW
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM
10100 SANTA MONICA BLVD., 7TH FLOOR
LOS ANGELES, CA 90067

GREGORY KOISER
CONSTELLATION NEW ENERGY, INC.
350 SOUTH GRAND AVENUE, SUITE 3800
LOS ANGELES, CA 90071

NORMAN A. PEDERSEN
ATTORNEY AT LAW
HANNA AND MORTON, LLP
444 SOUTH FLOWER STREET, NO. 1500
LOS ANGELES, CA 90071

MICHAEL MAZUR
CHIEF TECHNICAL OFFICER
3 PHASES RENEWABLES, LLC
2100 SEPULVEDA BLVD., SUITE 37
MANHATTAN BEACH, CA 90266

TIFFANY RAU
POLICY AND COMMUNICATIONS MANAGER
CARSON HYDROGEN POWER PROJECT LLC
ONE WORLD TRADE CENTER, SUITE 1600
LONG BEACH, CA 90831-1600

GREGORY KLATT
ATTORNEY AT LAW
DOUGLASS & LIDDELL
411 E. HUNTINGTON DRIVE, STE. 107-356
ARCADIA, CA 91006

MAUREEN LENNON
CALIFORNIA COGENERATION COUNCIL
595 EAST COLORADO BLVD., SUITE 623
PASADENA, CA 91101

RICHARD HELGESON
SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY
225 S. LAKE AVE., SUITE 1250
PASADENA, CA 91101

DANIEL W. DOUGLASS
ATTORNEY AT LAW
DOUGLASS & LIDDELL
21700 OXNARD STREET, SUITE 1030
WOODLAND HILLS, CA 91367

PAUL DELANEY
AMERICAN UTILITY NETWORK (A.U.N.)

AKBAR JAZAYEIRI
DIRECTOR OF REVENUE & TARRIFFS

10705 DEER CANYON DRIVE
ALTA LOMA, CA 91737

SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE. ROOM 390
ROSEMEAD, CA 91770

ANNETTE GILLIAM
ATTORNEY AT LAW
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

CATHY A. KARLSTAD
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE.
ROSEMEAD, CA 91770

LAURA I. GENAO
ATTORNEY
SOUTHERN CALIFORNIA EDISON
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

RONALD MOORE
GOLDEN STATE WATER/BEAR VALLEY ELECTRIC
630 EAST FOOTHILL BOULEVARD
SAN DIMAS, CA 91773

DON WOOD
PACIFIC ENERGY POLICY CENTER
4539 LEE AVENUE
LA MESA, CA 91941

AIMEE M. SMITH
ATTORNEY AT LAW
SEMPRA ENERGY
101 ASH STREET HQ13
SAN DIEGO, CA 92101

ALLEN K. TRIAL
SAN DIEGO GAS & ELECTRIC COMPANY
HQ-13
101 ASH STREET
SAN DIEGO, CA 92101

ALVIN PAK
SEMPRA GLOBAL ENTERPRISES
101 ASH STREET
SAN DIEGO, CA 92101

DAN HECHT
SEMPRA ENERGY
101 ASH STREET
SAN DIEGO, CA 92101

DANIEL A. KING
SEMPRA ENERGY
101 ASH STREET, HQ 12
SAN DIEGO, CA 92101

SYMONE VONGDEUANE
SEMPRA ENERGY SOLUTIONS
101 ASH STREET, HQ09
SAN DIEGO, CA 92101-3017

THEODORE ROBERTS
ATTORNEY AT LAW
SEMPRA GLOBAL
101 ASH STREET, HQ 13D
SAN DIEGO, CA 92101-3017

DONALD C. LIDDELL, P.C.
DOUGLASS & LIDDELL
2928 2ND AVENUE
SAN DIEGO, CA 92103

MARCIE MILNER
DIRECTOR - REGULATORY AFFAIRS
SHELL TRADING GAS & POWER COMPANY
4445 EASTGATE MALL, SUITE 100
SAN DIEGO, CA 92121

REID A. WINTHROP
PILOT POWER GROUP, INC.
8910 UNIVERSITY CENTER LANE, SUITE 520
SAN DIEGO, CA 92122

THOMAS DARTON
PILOT POWER GROUP, INC.
9320 CHESAPEAKE DRIVE, SUITE 112
SAN DIEGO, CA 92123

STEVE RAHON
DIRECTOR, TARIFF & REGULATORY ACCOUNTS

GLORIA BRITTON
ANZA ELECTRIC COOPERATIVE, INC.

SAN DIEGO GAS & ELECTRIC COMPANY
8330 CENTURY PARK COURT, CP32C
SAN DIEGO, CA 92123-1548

58470 HWY 371
PO BOX 391909
ANZA, CA 92539

LYNELLE LUND
COMMERCE ENERGY, INC.
600 ANTON BLVD., SUITE 2000
COSTA MESA, CA 92626

TAMLYN M. HUNT
ENERGY PROGRAM DIRECTOR
COMMUNITY ENVIRONMENTAL COUNCIL
26 W. ANAPAMU ST., 2/F
SANTA BARBARA, CA 93101

JEANNE M. SOLE
DEPUTY CITY ATTORNEY
CITY AND COUNTY OF SAN FRANCISCO
1 DR. CARLTON B. GOODLETT PLACE, RM. 234
SAN FRANCISCO, CA 94102

JOHN P. HUGHES
MANAGER, REGULATORY AFFAIRS
SOUTHERN CALIFORNIA EDISON COMPANY
601 VAN NESS AVENUE, STE. 2040
SAN FRANCISCO, CA 94102

LAD LORENZ
V.P. REGULATORY AFFAIRS
SOUTHERN CALIFORNIA GAS COMPANY
601 VAN NESS AVENUE, SUITE 2060
SAN FRANCISCO, CA 94102

MARCEL HAWIGER
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

NINA SUETAKE
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVE., STE 350
SAN FRANCISCO, CA 94102

DIANA L. LEE
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4300
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

F. JACKSON STODDARD
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5125
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

AUDREY CHANG
STAFF SCIENTIST
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

DONALD BROOKHYSER
ATTORNEY AT LAW
ALCANTAR & KAHL
120 MONTGOMERY STREET
SAN FRANCISCO, CA 94104

EVELYN KAHL
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

KRISTIN GRENFELL
PROJECT ATTORNEY, CALIF. ENERGY PROGRAM
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

MICHAEL P. ALCANTAR
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

SEEMA SRINIVASAN
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

WILLIAM H. CHEN
CONSTELLATION NEW ENERGY, INC.
SPEAR TOWER, 36TH FLOOR
ONE MARKET STREET
SAN FRANCISCO, CA 94105

BRIAN K. CHERRY
DIRECTOR REGULATORY RELATIONS

EDWARD G POOLE
ANDERSON DONOVAN & POOLE

PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, B10C
SAN FRANCISCO, CA 94106

601 CALIFORNIA STREET SUITE 1300
SAN FRANCISCO, CA 94108

ANN G. GRIMALDI
MCKENNA LONG & ALDRIDGE LLP
101 CALIFORNIA STREET, 41ST FLOOR
SAN FRANCISCO, CA 94111

BRIAN T. CRAGG
ATTORNEY AT LAW
GOODIN, MACBRIDE, SQUERI, RITCHIE & DAY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

JAMES D. SQUERI
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, STE 900
SAN FRANCISCO, CA 94111

JEANNE B. ARMSTRONG
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI DAY & LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

KAREN BOWEN
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111

LISA A. COTTLE
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111

SEAN P. BEATTY
ATTORNEY AT LAW
COOPER, WHITE & COOPER, LLP
201 CALIFORNIA ST., 17TH FLOOR
SAN FRANCISCO, CA 94111

VIDHYA PRABHAKARAN
GOODIN,MACBRIDE,SQUERI,DAY,LAMPREY
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

JOSEPH M. KARP
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET
SAN FRANCISCO, CA 94111-5802

JEFFREY P. GRAY
DAVIS WRIGHT TREMAINE, LLP
505 MONTGOMERY STREET, SUITE 800
SAN FRANCISCO, CA 94111-6533

CHRISTOPHER J. WARNER
PACIFIC GAS AND ELECTRIC COMPANY
77 BEALE STREET, PO BOX 7442
SAN FRANCISCO, CA 94120-7442

SARA STECK MYERS
ATTORNEY AT LAW
122 28TH AVENUE
SAN FRANCISCO, CA 94121

LARS KVALE
CENTER FOR RESOURCE SOLUTIONS
PRESIDIO BUILDING 97
PO BOX 39512
SAN FRANCISCO, CA 94129

ANDREW L. HARRIS
PACIFIC GAS & ELECTRIC COMPANY
PO BOX 770000
SAN FRANCISCO, CA 94177

ANDREA WELLER
STRATEGIC ENERGY
3130 D BALFOUR RD., SUITE 290
BRENTWOOD, CA 94513

JENNIFER CHAMBERLIN
STRATEGIC ENERGY, LLC
2633 WELLINGTON CT.
CLYDE, CA 94520

BETH VAUGHAN
CALIFORNIA COGENERATION COUNCIL

KERRY HATTEVIK
MIRANT CORPORATION

4391 N. MARSH ELDER COURT
CONCORD, CA 94521

696 WEST 10TH STREET
PITTSBURG, CA 94565

AVIS KOWALEWSKI
CALPINE CORPORATION
3875 HOPYARD ROAD, SUITE 345
PLEASANTON, CA 94588

WILLIAM H. BOOTH
ATTORNEY AT LAW
LAW OFFICES OF WILLIAM H. BOOTH
1500 NEWELL AVENUE, 5TH FLOOR
WALNUT CREEK, CA 94596

J. ANDREW HOERNER
REDEFINING PROGRESS
1904 FRANKLIN STREET
OAKLAND, CA 94612

JANILL RICHARDS
DEPUTY ATTORNEY GENERAL
CALIFORNIA ATTORNEY GENERAL'S OFFICE
1515 CLAY STREET, 20TH FLOOR
OAKLAND, CA 94702

CLIFF CHEN
UNION OF CONCERNED SCIENTIST
2397 SHATTUCK AVENUE, STE 203
BERKELEY, CA 94704

GREGG MORRIS
DIRECTOR
GREEN POWER INSTITUTE
2039 SHATTUCK AVENUE, STE 402
BERKELEY, CA 94704

R. THOMAS BEACH
CROSSBORDER ENERGY
2560 NINTH STREET, SUITE 213A
BERKELEY, CA 94710-2557

BARRY F. MCCARTHY
ATTORNEY AT LAW
MCCARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

C. SUSIE BERLIN
ATTORNEY AT LAW
MC CARTHY & BERLIN, LLP
100 PARK CENTER PLAZA, SUITE 501
SAN JOSE, CA 95113

MIKE LAMOND
ALPINE NATURAL GAS OPERATING CO. #1 LLC
PO BOX 550
VALLEY SPRINGS, CA 95252

JOY A. WARREN
ATTORNEY AT LAW
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

BALDASSARO DI CAPO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

JOHN JENSEN
PRESIDENT
MOUNTAIN UTILITIES
PO BOX 205
KIRKWOOD, CA 95646

MARY LYNCH
VP - REGULATORY AND LEGISLATIVE AFFAIRS
CONSTELLATION ENERGY COMMODITIES GROUP
2377 GOLD MEDAL WAY, SUITE 100
GOLD RIVER, CA 95670

LEONARD DEVANNA
EXECUTIVE VICE PRESIDENT
CLEAN ENERGY SYSTEMS, INC.
11330 SUNCO DRIVE, SUITE A
RANCHO CORDOVA, CA 95742

ANDREW BROWN
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95811

BRUCE MCLAUGHLIN
BRAUN & BLAISING, P.C.

GREGGORY L. WHEATLAND
ATTORNEY AT LAW

915 L STREET, SUITE 1270
SACRAMENTO, CA 95814

ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95814

JANE E. LUCKHARDT
ATTORNEY AT LAW
DOWNEY BRAND LLP
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO, CA 95814

JEFFERY D. HARRIS
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS LLP
2015 H STREET
SACRAMENTO, CA 95814

VIRGIL WELCH
CLIMATE CAMPAIGN COORDINATOR
ENVIRONMENTAL DEFENSE
1107 9TH STREET, SUITE 540
SACRAMENTO, CA 95814

WILLIAM W. WESTERFIELD, 111
ATTORNEY AT LAW
ELLISON, SCHNEIDER & HARRIS L.L.P.
2015 H STREET
SACRAMENTO, CA 95814

DOWNEY BRAND
JANE E. LUCKHARDT
555 CAPITOL MALL, 10TH FLOOR
SACRAMENTO, CA 95814-4686

RAYMOND J. CZAHAR, C.P.A.
CHIEF FINANCIAL OFFICER
WEST COAST GAS COMPANY
9203 BEATTY DRIVE
SACRAMENTO, CA 95826

STEVEN M. COHN
ASSISTANT GENERAL COUNSEL
SACRAMENTO MUNICIPAL UTILITY DISTRICT
PO BOX 15830
SACRAMENTO, CA 95852-1830

ANN L. TROWBRIDGE
ATTORNEY AT LAW
DAY CARTER & MURPHY, LLP
3620 AMERICAN RIVER DRIVE, SUITE 205
SACRAMENTO, CA 95864

DAN SILVERIA
SURPRISE VALLEY ELECTRIC CORPORATION
PO BOX 691
ALTURAS, CA 96101

JESSICA NELSON
PLUMAS-SIERRA RURAL ELECTRIC CO-OP
73233 STATE ROUTE 70, STE A
PORTOLA, CA 96122-7064

DONALD BROOKHYSER
ALCANTAR & KAHL
1300 SW FIFTH AVE., SUITE 1750
PORTLAND, OR 97210

CYNTHIA SCHULTZ
REGULATORY FILING COORDINATOR
PACIFIC POWER AND LIGHT COMPANY
825 N.E. MULTNOMAH
PORTLAND, OR 97232

KYLE L. DAVIS
PACIFICORP
825 NE MULTNOMAH,
PORTLAND, OR 97232

RYAN FLYNN
PACIFICORP
825 NE MULTNOMAH STREET, 18TH FLOOR
PORTLAND, OR 97232

IAN CARTER
POLICY COORDINATOR-NORTH AMERICA
INTERNATIONAL EMISSIONS TRADING ASSN.
350 SPARKS STREET, STE. 809
OTTAWA, ON K1R 7S8
CANADA

JASON DUBCHAK
ASSOCIATE GENERAL COUNSEL
WILD GOOSE STORAGE, LLC
C/O NISKA GAS STORAGE, SUITE 400
607 8TH AVENUE S.W.
CALGARY, AB T2P 0A7
CANADA

Information Only

BRIAN M. JONES
M. J. BRADLEY & ASSOCIATES, INC.
47 JUNCTION SQUARE DRIVE
CONCORD, MA 01742

KENNETH A. COLBURN
SYMBILITIC STRATEGIES, LLC
26 WINTON ROAD
MEREDITH, NH 03253

RICHARD COWART
REGULATORY ASSISTANCE PROJECT
50 STATE STREET, SUITE 3
MONTPELIER, VT 05602

KATHRYN WIG
PARALEGAL
NRG ENERGY, INC.
211 CARNEGIE CENTER
PRINCETON, NY 08540

SAKIS ASTERIADIS
APX INC
1270 FIFTH AVE., SUITE 15R
NEW YORK, NY 10029

GEORGE HOPLEY
BARCLAYS CAPITAL
200 PARK AVENUE
NEW YORK, NY 10166

ELIZABETH ZELLJADT
1725 I STREET, N.W. SUITE 300
WASHINGTON, DC 20006

DALLAS BURTRAW
1616 P STREET, NW
WASHINGTON, DC 20036

VERONIQUE BUGNION
POINT CARBON
205 SEVERN RIVER RD
SEVERNA PARK, MD 21146

KYLE D. BOUDREAUX
FPL GROUP
700 UNIVERSE BLVD., JES/JB
JUNO BEACH, FL 33408

ANDREW BRADFORD
SENIOR MARKET RESEARCH ASSOCIATE
FELLON-MCCORD & ASSOCIATES
SUITE 2000
9960 CORPORATE CAMPUS DRIVE
LOUISVILLE, KY 40223

GARY BARCH
FELLON-MCCORD & ASSOCIATES, INC.
SUITE 2000
9960 CORPORATE CAMPUS DRIVE
LOUISVILLE, KY 40223

RALPH E. DENNIS
DIRECTOR, REGULATORY AFFAIRS
FELLON-MCCORD & ASSOCIATES
CONSTELLATION NEWENERGY-GAS DIVISION
9960 CORPORATE CAMPUS DRIVE, STE 2000
LOUISVILLE, KY 40223

SAMARA MINDEL
REGULATORY AFFAIRS ANALYST
FELLON-MCCORD & ASSOCIATES
9960 CORPORATE CAMPUS DRIVE, SUITE 2000
LOUISVILLE, KY 40223

BARRY RABE
1427 ROSS STREET
PLYMOUTH, MI 48170

BRIAN POTTS
FOLEY & LARDNER
PO BOX 1497
150 EAST GILMAN STREET
MADISON, WI 53701-1497

JAMES W. KEATING
BP AMERICA, INC.
MAIL CODE 603-1E
150 W. WARRENVILLE RD.
NAPERVILLE, IL 60563

JAMES ROSS
RCS, INC.
500 CHESTERFIELD CENTER, SUITE 320
CHESTERFIELD, MO 63017

TRENT A. CARLSON
RELIANT ENERGY
1000 MAIN STREET
HOUSTON, TX 77001

GARY HINNERS
RELIANT ENERGY, INC.
PO BOX 148
HOUSTON, TX 77001-0148

JEANNE ZAIONTZ
BP ENERGY COMPANY
501 WESTLAKE PARK BLVD, RM. 4328
HOUSTON, TX 77079

JULIE L. MARTIN
WEST ISO COORDINATOR
NORTH AMERICA GAS AND POWER
BP ENERGY COMPANY
501 WESTLAKE PARK BLVD.
HOUSTON, TX 77079

FIJI GEORGE
EL PASO CORPORATION
EL PASO BUILDING
PO BOX 2511
HOUSTON, TX 77252

ED CHIANG
ELEMENT MARKETS, LLC
ONE SUGAR CREEK CENTER BLVD., SUITE 250
SUGAR LAND, TX 77478

NADAV ENBAR
ENERGY INSIGHTS
1750 14TH STREET, SUITE 200
BOULDER, CO 80302

NICHOLAS LENSSEN
ENERGY INSIGHTS
1750 14TH STREET, SUITE 200
BOULDER, CO 80302

ELIZABETH BAKER
SUMMIT BLUE CONSULTING
1722 14TH STREET, SUITE 230
BOULDER, CO 80304

WAYNE TOMLINSON
EL PASO CORPORATION
WESTERN PIPELINES
2 NORTH NEVADA AVENUE
COLORADO SPRINGS, CO 80903

KEVIN J. SIMONSEN
ENERGY MANAGEMENT SERVICES
646 EAST THIRD AVENUE
DURANGO, CO 81301

PHILIP D. LUSK
WESTERN ELECTRICITY COORDINATING COUNCIL
615 ARAPEEN DRIVE, SUITE 210
SALT LAKE CITY, UT 84108-1262

SANDRA ELY
NEW MEXICO ENVIRONMENT DEPARTMENT
1190 ST FRANCIS DRIVE
SANTA FE, NM 87501

BRIAN MCQUOWN
RELIANT ENERGY
7251 AMIGO ST., SUITE 120
LAS VEGAS, NV 89119

DOUGLAS BROOKS
NEVADA POWER COMPANY
SIERRA PACIFIC POWER COMPANY
6226 WEST SAHARA AVENUE
LAS VEGAS, NV 89151

ANITA HART
SENIOR SPECIALIST/STATE REGULATORY AFFAIR
SOUTHWEST GAS CORPORATION
5241 SPRING MOUNTAIN ROAD
LAS VEGAS, NV 89193

RANDY SABLE
SOUTHWEST GAS CORPORATION
MAILSTOP: LVB-105
5241 SPRING MOUNTAIN ROAD
LAS VEGAS, NV 89193

BILL SCHRAND
SOUTHWEST GAS CORPORATON
PO BOX 98510
LAS VEGAS, NV 89193-8510

JJ PRUCNAL
SOUTHWEST GAS CORPORATION
PO BOX 98510
LAS VEGAS, NV 89193-8510

MERIDITH J. STRAND
SENIOR COUNSEL
SOUTHWEST GAS CORPORATION
PO BOX 98510
LAS VEGAS, NV 89193-8510

CYNTHIA MITCHELL
ENERGY ECONOMICS, INC.
530 COLGATE COURT
RENO, NV 89503

CHRISTOPHER A. HILEN
ASSISTANT GENERAL COUNSEL
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89511

ELENA MELLO
SIERRA PACIFIC POWER COMPANY
6100 NEIL ROAD
RENO, NV 89520

TREVOR DILLARD
SIERRA PACIFIC POWER COMPANY
PO BOX 10100
6100 NEIL ROAD, MS S4A50
RENO, NV 89520

DARRELL SOYARS
MANAGER-RESOURCE PERMITTING&STRATEGIC
SIERRA PACIFIC RESOURCES
6100 NEIL ROAD
RENO, NV 89520-0024

FRANK LUCHETTI
NEVADA DIV. OF ENVIRONMENTAL PROTECTION
901 S. STEWART ST., SUITE 4001
CARSON CITY, NV 89701

LEILANI JOHNSON KOWAL
LOS ANGELES DEPT. OF WATER AND POWER
111 N. HOPE STREET, ROOM 1050
LOS ANGELES, CA 90012

LORRAINE PASKETT
DIRECTOR, LEGISLATIVE AND REG. AFFAIRS
LA DEPT. OF WATER & POWER
PO BOX 51111
111 N. HOWARD ST., ROOM 1536
LOS ANGELES, CA 90012

RANDY S. HOWARD
LOS ANGELES DEPT. OF WATER AND POWER
111 NORTH HOPE STREET, ROOM 921
LOS ANGELES, CA 90012

ROBERT L. PETTINATO
LOS ANGELES DEPARTMENT OF WATER & POWER
111 NORTH HOPE STREET, SUITE 1150
LOS ANGELES, CA 90012

HUGH YAO
SOUTHERN CALIFORNIA GAS COMPANY
555 W. 5TH ST, GT22G2
LOS ANGELES, CA 90013

RASHA PRINCE
SOUTHERN CALIFORNIA GAS COMPANY
555 WEST 5TH STREET, GT14D6
LOS ANGELES, CA 90013

RANDALL W. KEEN
ATTORNEY AT LAW
MANATT PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064

S. NANCY WHANG
ATTORNEY AT LAW
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064

PETER JAZAYERI
STROOCK & STROOCK & LAVAN LLP
2029 CENTURY PARK EAST, SUITE 1800
LOS ANGELES, CA 90067

DEREK MARKOLF
CALIFORNIA CLIMATE ACTION REGISTRY
515 S. FLOWER STREET, SUITE 1640
LOS ANGELES, CA 90071

DAVID NEMTZOW
1254 9TH STREET, NO. 6
SANTA MONICA, CA 90401

HARVEY EDER
PUBLIC SOLAR POWER COALITION
1218 12TH ST., 25
SANTA MONICA, CA 90401

VITALY LEE
AES ALAMITOS, LLC
690 N. STUDEBAKER ROAD
LONG BEACH, CA 90803

STEVE ENDO
DEPARTMENT OF WATER & POWER
150 S LOS ROBLES AVE., STE. 200
PASADENA, CA 91101

STEVEN G. LINS
CITY OF GLENDALE
OFFICE OF THE CITY ATTORNEY
613 EAST BROADWAY, SUITE 220
GLENDALE, CA 91206-4394

TOM HAMILTON
MANAGING PARTNER
ENERGY CONCIERGE SERVICES
321 MESA LILA RD
GLENDALE, CA 91208

BRUNO JEIDER
BURBANK WATER & POWER
164 WEST MAGNOLIA BLVD.
BURBANK, CA 91502

RICHARD J. MORILLO
ASSISTANT CITY ATTORNEY
CITY OF BURBANK
215 E. OLIVE AVENUE
BURBANK, CA 91502

ROGER PELOTE
WILLIAMS POWER COMPANY
12736 CALIFA STREET
VALLEY VILLAGE, CA 91607

AIMEE BARNES
MANAGER REGULATORY AFFAIRS
ECOSECURITIES
HARVARD SQUARE
206 W. BONITA AVENUE
CLAREMONT, CA 91711

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE., RM. 370
ROSEMEAD, CA 91770

TIM HEMIG
NRG ENERGY, INC.
1819 ASTON AVENUE, SUITE 105
CARLSBAD, CA 92008

BARRY LOVELL
15708 POMERADO RD., SUITE 203
POWAY, CA 92064

ALDYN HOEKSTRA
PACE GLOBAL ENERGY SERVICES
420 WEST BROADWAY, 4TH FLOOR
SAN DIEGO, CA 92101

YVONNE GROSS
REGULATORY POLICY MANAGER
SEMPRA ENERGY
HQ08C
101 ASH STREET
SAN DIEGO, CA 92103

JOHN LAUN
APOGEE INTERACTIVE, INC.
1220 ROSECRANS ST., SUITE 308
SAN DIEGO, CA 92106

KIM KIENER
504 CATALINA BLVD.
SAN DIEGO, CA 92106

SCOTT J. ANDERS
RESEARCH/ADMINISTRATIVE DIRECTOR
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 ALCALA PARK
SAN DIEGO, CA 92110

JOSEPH R. KLOBERDANZ
SAN DIEGO GAS & ELECTRIC
PO BOX 1831
SAN DIEGO, CA 92112

ANDREW MCALLISTER
DIRECTOR OF OPERATIONS
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVE., SUITE 100
SAN DIEGO, CA 92123

JACK BURKE
LEGISLATIVE AFFAIRS MANAGER
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVE., SUITE 100
SAN DIEGO, CA 92123

JENNIFER PORTER
POLICY ANALYST
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVENUE, SUITE 100
SAN DIEGO, CA 92123

SEPHRA A. NINOW
POLICY ANALYST
CALIFORNIA CENTER FOR SUSTAINABLE ENERGY
8690 BALBOA AVENUE, SUITE 100
SAN DIEGO, CA 92123

JOHN W. LESLIE
ATTORNEY AT LAW
LUCE, FORWARD, HAMILTON & SCRIPPS, LLP
11988 EL CAMINO REAL, SUITE 200
SAN DIEGO, CA 92130

ORLANDO B. FOOTE, III
ATTORNEY AT LAW
HORTON, KNOX, CARTER & FOOTE
895 BROADWAY, SUITE 101
EL CENTRO, CA 92243

ELSTON K. GRUBAUGH
IMPERIAL IRRIGATION DISTRICT
333 EAST BARIONI BLVD.
IMPERIAL, CA 92251

JAN PEPPER
CLEAN POWER MARKETS, INC.
PO BOX 3206
418 BENVENUE AVENUE
LOS ALTOS, CA 94024

GLORIA D. SMITH
ADAMS, BROADWELL, JOSEPH & CARDOZO
601 GATEWAY BLVD., SUITE 1000
SOUTH SAN FRANCISCO, CA 94080

MARC D. JOSEPH
ADAMS BRADWELL JOSEPH & CARDOZO
601 GATEWAY BLVD. STE 1000
SOUTH SAN FRANCISCO, CA 94080

DIANE I. FELLMAN
ATTORNEY AT LAW
LAW OFFICES OF DIANE I. FELLMAN
234 VAN NESS AVENUE
SAN FRANCISCO, CA 94102

HAYLEY GOODSON
ATTORNEY AT LAW
THE UTILITY REFORM NETWORK
711 VAN NESS AVENUE, SUITE 350
SAN FRANCISCO, CA 94102

MICHEL FLORIO
ATTORNEYS AT LAW
711 VAN NESS AVE., STE. 350
SAN FRANCISCO, CA 94102

DAN ADLER
DIRECTOR, TECH AND POLICY DEVELOPMENT
CALIFORNIA CLEAN ENERGY FUND
5 THIRD STREET, SUITE 1125
SAN FRANCISCO, CA 94103

MICHAEL A. HYAMS
POWER ENTERPRISE-REGULATORY AFFAIRS
SAN FRANCISCO PUBLIC UTILITIES COMM
1155 MARKET ST., 4TH FLOOR
SAN FRANCISCO, CA 94103

THERESA BURKE
SAN FRANCISCO PUC
1155 MARKET STREET, 4TH FLOOR
SAN FRANCISCO, CA 94103

NORMAN J. FURUTA
ATTORNEY AT LAW
FEDERAL EXECUTIVE AGENCIES
1455 MARKET ST., SUITE 1744
SAN FRANCISCO, CA 94103-1399

AMBER MAHONE
ENERGY & ENVIRONMENTAL ECONOMICS, INC.
101 MONTGOMERY STREET, SUITE 1600
SAN FRANCISCO, CA 94104

ANNABELLE MALINS
CONSUL-SCIENCE AND TECHNOLOGY
BRITISH CONSULATE-GENERAL
ONE SANSOME STREET, SUITE 850
SAN FRANCISCO, CA 94104

DEVRA WANG
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

KAREN TERRANOVA
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, STE 2200
SAN FRANCISCO, CA 94104

NORA SHERIFF
ATTORNEY AT LAW
ALCANTAR & KAHL, LLP
120 MONTGOMERY STREET, SUITE 2200
SAN FRANCISCO, CA 94104

OLOF BYSTROM
DIRECTOR, WESTERN ENERGY
CAMBRIDGE ENERGY RESEARCH ASSOCIATES
555 CALIFORNIA STREET, 3RD FLOOR
SAN FRANCISCO, CA 94104

SETH HILTON
ATTORNEY AT LAW
STOEL RIVES
111 SUTTER ST., SUITE 700
SAN FRANCISCO, CA 94104

SHERYL CARTER
NATURAL RESOURCES DEFENSE COUNCIL
111 SUTTER STREET, 20TH FLOOR
SAN FRANCISCO, CA 94104

ASHLEE M. BONDS
THELEN REID BROWN RAYSMAN&STEINER LLP
SUITE 1800
101 SECOND STREET
SAN FRANCISCO, CA 94105

CARMEN E. BASKETTE
CORPORATE DEVELOPMENT PRINCIPAL
594 HOWARD ST., SUITE 400
SAN FRANCISCO, CA 94105

COLIN PETHERAM
DIRECTOR-REGULATORY
SBC CALIFORNIA
140 NEW MONTGOMERY ST., SUITE 1325
SAN FRANCISCO, CA 94105

JAMES W. TARNAGHAN
DUANE MORRIS LLP
SUITE 2000
ONE MARKET, SPEAR TOWER
SAN FRANCISCO, CA 94105

KEVIN FOX
WILSON SONSINI GOODRICH & ROSATI
ONE MARKET STREET, SPEAR TOWER, 3300
SAN FRANCISCO, CA 94105

KHURSHID KHOJA
ASSOCIATE
THELEN REID BROWN RAYSMAN & STEINER
101 SECOND STREET, SUITE 1800
SAN FRANCISCO, CA 94105

PETER V. ALLEN
THELEN REID BROWN RAYSMAN & STEINER
101 SECOND STREET, SUITE 1800
SAN FRANCISCO, CA 94105

SHERIDAN J. PAUKER
WILSON SONSINI GOODRICH & ROSATI
SPEAR TOWER, SUITE 3300
ONE MARKET ST
SAN FRANCISCO, CA 94105

ROBERT J. REINHARD
MORRISON AND FOERSTER
425 MARKET STREET
SAN FRANCISCO, CA 94105-2482

CALIFORNIA ENERGY MARKETS
517-B POTRERO AVENUE
SAN FRANCISCO, CA 94110

HOWARD V. GOLUB
NIXON PEABODY LLP
2 EMBARCADERO CENTER, STE. 2700
SAN FRANCISCO, CA 94111

JANINE L. SCANCARELLI
ATTORNEY AT LAW
FOLGER, LEVIN & KAHN, LLP
275 BATTERY STREET, 23RD FLOOR
SAN FRANCISCO, CA 94111

JOSEPH F. WIEDMAN
ATTORNEY AT LAW
GOODIN MACBRIDE SQUERI DAY & LAMPREY LLP
505 SANSOME STREET, SUITE 900
SAN FRANCISCO, CA 94111

MARTIN A. MATTES
NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP
50 CALIFORNIA STREET, 34TH FLOOR
SAN FRANCISCO, CA 94111

JEN MCGRAW
CENTER FOR NEIGHBORHOOD TECHNOLOGY
PO BOX 14322
SAN FRANCISCO, CA 94114

LISA WEINZIMER
ASSOCIATE EDITOR
PLATTS MCGRAW-HILL
695 NINTH AVENUE, NO. 2
SAN FRANCISCO, CA 94118

STEVEN MOSS
SAN FRANCISCO COMMUNITY POWER COOP
2325 3RD STREET, SUITE 344
SAN FRANCISCO, CA 94120

SHAUN ELLIS
2183 UNION STREET
SAN FRANCISCO, CA 94123

ARNO HARRIS
RECURRENT ENERGY, INC.
220 HALLECK ST., SUITE 220
SAN FRANCISCO, CA 94129

ED LUCHA
PROJECT COORDINATOR
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B9A
SAN FRANCISCO, CA 94177

GRACE LIVINGSTON-NUNLEY
ASSISTANT PROJECT MANAGER
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000 MAIL CODE B9A
SAN FRANCISCO, CA 94177

JASMIN ANSAR
PG&E
MAIL CODE B24A
PO BOX 770000
SAN FRANCISCO, CA 94177

JONATHAN FORRESTER
PG&E
MAIL CODE N13C
PO BOX 770000
SAN FRANCISCO, CA 94177

SEBASTIEN CSAPO
PROJECT MANAGER
PACIFIC GAS AND ELECTRIC COMPANY
MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177

SOUMYA SASTRY
PACIFIC GAS AND ELECTRIC COMPANY
MAIL CODE B9A
PO BOX 770000
SAN FRANCISCO, CA 94177

STEPHANIE LA SHAWN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, MAIL CODE B9A
SAN FRANCISCO, CA 94177

VALERIE J. WINN
PACIFIC GAS AND ELECTRIC COMPANY
PO BOX 770000, B9A
SAN FRANCISCO, CA 94177-0001

KARLA DAILEY
CITY OF PALO ALTO
UTILITIES DEPARTMENT
BOX 10250
PALO ALTO, CA 94303

FARROKH ALBUYEH
VICE PRESIDENT
OPEN ACCESS TECHNOLOGY INTERNATIONAL INC
SUITE 910
1875 SOUTH GRANT STREET
SAN MATEO, CA 94402

GREG BLUE
140 MOUNTAIN PKWY.
CLAYTON, CA 94517

DEAN R. TIBBS
PRESIDENT
ADVANCED ENERGY STRATEGIES, INC.
1390 WILLOW PASS ROAD, SUITE 610
CONCORD, CA 94520

JEFFREY L. HAHN
COVANTA ENERGY CORPORATION
876 MT. VIEW DRIVE
LAFAYETTE, CA 94549

ANDREW J. VAN HORN
VAN HORN CONSULTING
12 LIND COURT
ORINDA, CA 94563

SUE KATELEY
EXECUTIVE DIRECTOR
CALIFORNIA SOLAR ENERGY INDUSTRIES ASSN
PO BOX 782
RIO VISTA, CA 94571

JOSEPH M. PAUL
SENIOR CORPORATE COUNSEL
DYNEGY, INC.
2420 CAMINO RAMON, SUITE 215
SAN RAMON, CA 94583

MONICA A. SCHWEBS, ESQ.
BINGHAM MCCUTCHEN LLP
SUITE 210
1333 N. CALIFORNIA BLVD.
WALNUT CREEK, CA 94596

PETER W. HANSCHEN
ATTORNEY AT LAW
MORRISON & FOERSTER, LLP
101 YGNACIO VALLEY ROAD, SUITE 450
WALNUT CREEK, CA 94596

JOSEPH HENRI
31 MIRAMONTE ROAD
WALNUT CREEK, CA 94597

PATRICIA THOMPSON
SUMMIT BLUE CONSULTING
2920 CAMINO DIABLO, SUITE 210
WALNUT CREEK, CA 94597

WILLIAM F. DIETRICH
ATTORNEY AT LAW
DIETRICH LAW
2977 YGNACIO VALLEY ROAD, 613
WALNUT CREEK, CA 94598-3535

BETTY SETO
POLICY ANALYST
KEMA, INC.
492 NINTH STREET, SUITE 220
OAKLAND, CA 94607

GERALD L. LAHR
ABAG POWER
101 EIGHTH STREET
OAKLAND, CA 94607

JODY S. LONDON
JODY LONDON CONSULTING
PO BOX 3629
OAKLAND, CA 94609

STEVEN SCHILLER
SCHILLER CONSULTING, INC.
111 HILLSIDE AVENUE
PIEDMONT, CA 94611

MRW & ASSOCIATES, INC.
1814 FRANKLIN STREET, SUITE 720
OAKLAND, CA 94612

REED V. SCHMIDT
VICE PRESIDENT
BARTLE WELLS ASSOCIATES
1889 ALCATRAZ AVENUE
BERKELEY, CA 94703

ADAM BRIONES
THE GREENLINING INSTITUTE
1918 UNIVERSITY AVENUE, 2ND FLOOR
BERKELEY, CA 94704

CLYDE MURLEY
1031 ORDWAY STREET
ALBANY, CA 94706

BRENDA LEMAY
DIRECTOR OF PROJECT DEVELOPMENT
HORIZON WIND ENERGY
1600 SHATTUCK, SUITE 222
BERKELEY, CA 94709

CARLA PETERMAN
UCEI
2547 CHANNING WAY
BERKELEY, CA 94720

EDWARD VINE
LAWRENCE BERKELEY NATIONAL LABORATORY
BUILDING 90-4000
BERKELEY, CA 94720

RYAN WISER
BERKELEY LAB
MS-90-4000
ONE CYCLOTRON ROAD
BERKELEY, CA 94720

CHRIS MARNAY
BERKELEY LAB
1 CYCLOTRON RD MS 90R4000
BERKELEY, CA 94720-8136

PHILLIP J. MULLER
SCD ENERGY SOLUTIONS
436 NOVA ALBION WAY
SAN RAFAEL, CA 94903

RITA NORTON
RITA NORTON AND ASSOCIATES, LLC
18700 BLYTHSWOOD DRIVE,
LOS GATOS, CA 95030

CARL PECHMAN
POWER ECONOMICS
901 CENTER STREET
SANTA CRUZ, CA 95060

MAHLON ALDRIDGE
ECOLOGY ACTION
PO BOX 1188
SANTA CRUZ, CA 95060

RICHARD SMITH
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95352-4060

CHRISTOPHER J. MAYER
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

ROGER VAN HOY
MODESTO IRRIGATION DISTRICT
1231 11TH STREET
MODESTO, CA 95354

WES MONIER
STRATEGIC ISSUES AND PLANNING MANAGER
TURLOCK IRRIGATION DISTRICT
333 EAST CANAL DRIVE, PO BOX 949
TURLOCK, CA 95381-0949

BARBARA R. BARKOVICH
BARKOVICH & YAP, INC.
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460

JOHN R. REDDING
ARCTURUS ENERGY CONSULTING
44810 ROSEWOOD TERRACE
MENDOCINO, CA 95460

CLARK BERNIER
RLW ANALYTICS
1055 BROADWAY, SUITE G
SONOMA, CA 95476

RICHARD MCCANN, PH.D
M. CUBED
2655 PORTAGE BAY, SUITE 3
DAVIS, CA 95616

CAROLYN M. KEHREIN
ENERGY MANAGEMENT SERVICES
1505 DUNLAP COURT
DIXON, CA 95620-4208

CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

GRANT ROSENBLUM, ESQ.
CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

KAREN EDSON
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

ROBIN SMUTNY-JONES
CALIFORNIA ISO
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

SAEED FARROKHPAY
FEDERAL ENERGY REGULATORY COMMISSION
110 BLUE RAVINE RD., SUITE 107
FOLSOM, CA 95630

DAVID BRANCHCOMB
BRANCHCOMB ASSOCIATES, LLC
9360 OAKTREE LANE
ORANGEVILLE, CA 95662

KENNY SWAIN
NAVIGANT CONSULTING
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670

KIRBY DUSEL
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670

GORDON PICKERING
PRINCIPAL
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

LAURIE PARK
NAVIGANT CONSULTING, INC.
3100 ZINFANDEL DRIVE, SUITE 600
RANCHO CORDOVA, CA 95670-6078

DAVID REYNOLDS
MEMBER SERVICES MANAGER
NORTHERN CALIFORNIA POWER AGENCY
180 CIRBY WAY
ROSEVILLE, CA 95678-6420

SCOTT TOMASHEFSKY
NORTHERN CALIFORNIA POWER AGENCY
180 CIRBY WAY
ROSEVILLE, CA 95678-6420

ELLEN WOLFE
RESERO CONSULTING
9289 SHADOW BROOK PL.
GRANITE BAY, CA 95746

AUDRA HARTMANN
980 NINTH STREET, SUITE 2130
SACRAMENTO, CA 95814

BOB LUCAS
LUCAS ADVOCATES
1121 L STREET, SUITE 407
SACRAMENTO, CA 95814

CURT BARRY
717 K STREET, SUITE 503
SACRAMENTO, CA 95814

DAVID L. MODISETTE
EXECUTIVE DIRECTOR
CALIFORNIA ELECTRIC TRANSP. COALITION
1015 K STREET, SUITE 200
SACRAMENTO, CA 95814

KELLIE SMITH
SENATE ENERGY/UTILITIES & COMMUNICATION
STATE CAPITOL, ROOM 4038
SACRAMENTO, CA 95814

MICHAEL WAUGH
AIR RESOURCES BOARD
1001 10TH STREET
SACRAMENTO, CA 95814

PATRICK STONER
PROGRAM DIRECTOR
LOCAL GOVERNMENT COMMISSION
1303 J STREET, SUITE 250
SACRAMENTO, CA 95814

RACHEL MCMAHON
CEERT
1100 11TH STREET, SUITE 311
SACRAMENTO, CA 95814

WEBSTER TASAT
AIR RESOURCES BOARD
1001 I STREET
SACRAMENTO, CA 95814

STEVEN KELLY
INDEPENDENT ENERGY PRODUCERS ASSN
1215 K STREET, SUITE 900
SACRAMENTO, CA 95814-3947

EDWARD J. TIEDEMANN
ATTORNEY AT LAW
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
400 CAPITOL MALL, 27TH FLOOR
SACRAMENTO, CA 95814-4416

JOSHUA BUSHINSKY
WESTERN POLICY COORDINATOR
PEW CENTER ON GLOBAL CLIMATE CHANGE
2101 WILSON BLVD., SUITE 550
ARLINGTON, VA 95816

LYNN HAUG
ELLISON, SCHNEIDER & HARRIS, LLP
2015 H STREET
SACRAMENTO, CA 95816

OBADIAH BARTHOLOMY
MECHANICAL ENGINEER
SACRAMENTO MUNICIPAL UTILITY DISTRICT
M.S. B257
6201 S. STREET
SACRAMENTO, CA 95817

BUD BEEBE
SACRAMENTO MUNICIPAL UTIL DIST
MS B257
6201 S STREET
SACRAMENTO, CA 95817-1899

BALWANT S. PUREWAL
DEPARTMENT OF WATER RESOURCES
3310 EL CAMINO AVE., LL-90
SACRAMENTO, CA 95821

DOUGLAS MACMULLEN
CHIEF, POWER PLANNING SECTION
CA DEPARTMENT OF WATER RESOURCES
3310 EL CAMINO AVE., ROOM 356
SACRAMENTO, CA 95821

KAREN NORENE MILLS
ATTORNEY AT LAW
CALIFORNIA FARM BUREAU FEDERATION
2300 RIVER PLAZA DRIVE
SACRAMENTO, CA 95833

KAREN LINDH
LINDH & ASSOCIATES
7909 WALERGA ROAD, NO. 112, PMB 119
ANTELOPE, CA 95843

ELIZABETH W. HADLEY
CITY OF REDDING
777 CYPRESS AVENUE
REDDING, CA 96001

DENISE HILL
DIRECTOR
4004 KRUSE WAY PLACE, SUITE 150
LAKE OSWEGO, OR 97035

ANNIE STANGE
ALCANTAR & KAHL
1300 SW FIFTH AVE., SUITE 1750
PORTLAND, OR 97201

ELIZABETH WESTBY
ALCANTAR & KAHL, LLP
1300 SW FIFTH AVENUE, SUITE 1700
PORTLAND, OR 97201

ALEXIA C. KELLY
THE CLIMATE TRUST
65 SW YAMHILL STREET, SUITE 400
PORTLAND, OR 97204

ALAN COMNES
WEST COAST POWER
3934 SE ASH STREET
PORTLAND, OR 97214

KYLE SILON
ECOSECURITIES CONSULTING LIMITED
529 SE GRAND AVENUE
PORTLAND, OR 97214

CATHIE ALLEN
CA STATE MGR.
PACIFICORP
825 NE MULTNOMAH STREET, SUITE 2000
PORTLAND, OR 97232

PHIL CARVER
OREGON DEPARTMENT OF ENERGY
625 MARION ST., NE
SALEM, OR 97301-3737

SAM SADLER
OREGON DEPARTMENT OF ENERGY
625 NE MARION STREET
SALEM, OR 97301-3737

LISA SCHWARTZ
SENIOR ANALYST
ORGEON PUBLIC UTILITY COMMISSION
PO BOX 2148
SALEM, OR 97308-2148

CLARE BREIDENICH
224 1/2 24TH AVENUE EAST
SEATTLE, WA 98112

DONALD SCHOENBECK
RCS, INC.
900 WASHINGTON STREET, SUITE 780
VANCOUVER, WA 98660

JESUS ARREDONDO
NRG ENERGY INC.
4600 CARLSBAD BLVD.
CARLSBAD, CA 92008

CHARLIE BLAIR
DELTA ENERGY & ENVIRONMENT
15 GREAT STUART STREET
EDINBURGH, UK EH2 7TP
UNITED KINGDOM

KAREN MCDONALD
POWEREX CORPORATION
1400,
666 BURRAND STREET
VANCOUVER, BC V6C 2X8
CANADA

State Service

JAMES LOEWEN
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
320 WEST 4TH STREET SUITE 500
LOS ANGELES, CA 90013

CLARENCE BINNINGER
DEPUTY ATTORNEY GENERAL
CALIFORNIA ATTORNEY GENERAL'S OFFICE
455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102

DAVID ZONANA
DEPUTY ATTORNEY GENERAL
CALIFORNIA ATTORNEY GENERAL'S OFFICE
455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102

ANDREW CAMPBELL
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5203
505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3214

ANNE GILLETTE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BETH MOORE
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4103
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CHARLOTTE TERKEURST
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5117
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

CHRISTINE S. TAM
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

DONALD R. SMITH
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

ED MOLDAVSKY
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5130
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

EUGENE CADENASSO
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

HARVEY Y. MORRIS
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5036
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

HENRY STERN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 2106
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JACLYN MARKS
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5306
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JACQUELINE GREIG
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JAMIE FORDYCE
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
AREA 5-B
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JASON R. SALMI KLOTZ
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JEORGE S. TAGNIPES
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JOEL T. PERLSTEIN
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 5133
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JONATHAN LAKRITZ
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5020
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

JUDITH IKLE
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
ROOM 4012
505 VAN NESS AVENUE

JULIE A. FITCH
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3214

KRISTIN RALFF DOUGLAS
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

LANA TRAN
CALIF PUBLIC UTILITIES COMMISSION
ELECTRIC GENERATION PERFORMANCE BRANCH
AREA 2-D
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MEG GOTTSTEIN
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 2106
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PAMELA WELLNER
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PEARLIE SABINO
CALIF PUBLIC UTILITIES COMMISSION
ENERGY COST OF SERVICE & NATURAL GAS BRA
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RICHARD A. MYERS
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SCOTT MURTISHAW
CALIF PUBLIC UTILITIES COMMISSION
ENERGY DIVISION
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

STEVE ROSCOW
CALIF PUBLIC UTILITIES COMMISSION
RATEMAKING BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

BILL LOCKYER
STATE ATTORNEY GENERAL
STATE OF CALIFORNIA, DEPT OF JUSTICE
PO BOX 944255
SACRAMENTO, CA 94244-2550

SAN FRANCISCO, CA 94102-3214

LAINIE MOTAMEDI
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
ROOM 5119
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MATTHEW DEAL
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5215
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

NANCY RYAN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5217
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

PAUL S. PHILLIPS
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4101
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

RAHMOM MOMOH
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
ROOM 4205
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SARA M. KAMINS
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SEAN A. SIMON
CALIF PUBLIC UTILITIES COMMISSION
ENERGY RESOURCES BRANCH
AREA 4-A
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

THERESA CHO
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5207
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KEN ALEX
PO BOX 944255
1300 I STREET, SUITE 125
SACRAMENTO, CA 94244-2550

BALDASSARO DICAPO
CALIFORNIA ISO
LEGAL AND REGULATORY DEPARTMENT
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

JUDITH B. SANDERS
ATTORNEY AT LAW
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

JULIE GILL
EXTERNAL AFFAIRS MANAGER
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

MARY MCDONALD
DIRECTOR OF STATE AFFAIRS
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

PHILIP D. PETTINGILL
CALIFORNIA INDEPENDENT SYSTEM OPERATOR
151 BLUE RAVINE ROAD
FOLSOM, CA 95630

MICHAEL SCHEIBLE
DEPUTY EXECUTIVE OFFICER
CALIFORNIA AIR RESOURCES BOARD
1001 I STREET
SACRAMENTO, CA 95677

MEG GOTTSTEIN
ADMINISTRATIVE LAW JUDGE
PO BOX 210/21496 NATIONAL STREET
VOLCANO, CA 95689

PAM BURMICH
AIR RESOURCES BOARD
1001 I STREET, BOX 2815
SACRAMENTO, CA 95812

B. B. BLEVINS
EXECUTIVE DIRECTOR
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS-39
SACRAMENTO, CA 95814

DARYL METZ
CALIFORNIA ENERGY COMMISSION
1516 9TH ST., MS-20
SACRAMENTO, CA 95814

DEBORAH SLON
DEPUTY ATTORNEY GENERAL, ENVIRONMENT
OFFICE OF THE ATTORNEY GENERAL
1300 I STREET, 15TH FLOOR
SACRAMENTO, CA 95814

DON SCHULTZ
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY RESOURCES & PRICING BRANCH
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

KAREN GRIFFIN
EXECUTIVE OFFICE
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET, MS 39
SACRAMENTO, CA 95814

LISA DECARLO
STAFF COUNSEL
CALIFORNIA ENERGY COMMISSION
1516 9TH STREET MS-14
SACRAMENTO, CA 95814

MARC PRYOR
CALIFORNIA ENERGY COMMISSION
1516 9TH ST., MS-20
SACRAMENTO, CA 95814

MICHELLE GARCIA
AIR RESOURCES BOARD
1001 I STREET
SACRAMENTO, CA 95814

PIERRE H. DUVAIR
CALIFORNIA ENERGY COMMISSION
1516 NINTH STREET, MS-41
SACRAMENTO, CA 95814

WADE MCCARTNEY
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF STRATEGIC PLANNING
770 L STREET, SUITE 1050
SACRAMENTO, CA 95814

CAROL J. HURLOCK
CALIFORNIA DEPT. OF WATER RESOURCES
JOINT OPERATIONS CENTER
3310 EL CAMINO AVE. RM 300
SACRAMENTO, CA 95821

HOLLY B. CRONIN
STATE WATER PROJECT OPERATIONS DIV
CALIFORNIA DEPARTMENT OF WATER RESOURCES
3310 EL CAMINO AVE., LL-90
SACRAMENTO, CA 95821